

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
2 MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

3
4 CABINET RESOURCE GROUP, a Montana
5 non-profit corporation,

No. 43914

Judge Bennett

6 Plaintiff,

INDEXED

7 and

8 MONTANA WILDERNESS ASSOCIATION, a
9 Montana non-profit corporation,

10 Plaintiff,

11 vs.

OPINION

12 MONTANA DEPARTMENT OF STATE LANDS,

13 Defendant,

14 and

15 MONTANA DEPARTMENT OF HEALTH AND
16 ENVIRONMENTAL SCIENCES,

17 Defendant,

18 and

19 ASARCO, INC.,

20 Defendant.

21 The complaint in this action, filed June 8, 1979 and amended
22 September 6, 1979, seeks a number of declaratory judgments and writs of
23 mandate. These petitions involve the role of the Department of State
24 Lands (DSL) and the Department of Health and Environmental Sciences
25 (DHES) under the Montana Constitution; the Montana Environmental Policy
26 Act (MEPA), 75-1-101, et seq., MCA; the Hard Rock Mining Act (HRMA),
27 82-4-351, MCA, and other statutes which apply specifically to the
28 agencies. The case involves a mine which Asarco proposes to operate
29 in the Cabinet Mountains near Troy, Montana. Preliminary motions to
30 dismiss and for partial summary judgment were disposed of during the
31 hearing and by our opinion and order of January 25, 1982. Asarco and
32 DSL thereafter moved for partial summary judgment and for

1 "clarification or reconsideration." These motions are addressed to
2 Counts I, II and VIII of the amended complaint. In Count VIII
3 plaintiffs allege groundwater will be polluted by discharge from the
4 tailings ponds of the mine. Asarco's and DSL's motions for partial
5 summary judgment on this count were granted during the hearing on the
6 motions on the ground the count was not timely. The count may be
7 revived, however, when timely.

8 Counts I and II involve DSL's assertion that MEPA does not provide
9 it with authority to condition, reject or grant a permit under the
10 HRMA. As to these counts we originally took the following action:

11 1.) Plaintiff's motion for partial summary judgment as to Count I,
12 made on the ground DSL misinterpreted the effect of MEPA on its
13 function under the HRMA, was granted.

14 2.) Plaintiff's motion for partial summary judgment as to Count
15 II, made on the ground DSL relied upon an incorrect interpretation of
16 the effect of MEPA on its function under the HRMA in granting the
17 permit, was denied as there remained issues of material fact which
18 were left unresolved.

19 Defendants Asarco and DSL present basically the same arguments as
20 were made prior to our earlier decision, urging that their motions for
21 summary judgment as to Count I should be granted, which would mandate
22 a judgment in their favor as to Count II as well. These parties cite
23 a 1980 decision by Judge Meloy which was not previously considered.

24 We do not find that decision, Northern Tier Information Committee v.
25 Northern Tier Pipeline Company (Lewis and Clark County, Cause No.
26 44987), controlling. The discussion in that opinion pertained to the
27 eminent domain statute rather than the HRMA, and the issues in that
28 case were determined moot.

29 We now address, for the second time, the contention that MEPA does
30 not supplement DSL's permit authority under the HRMA. We reach the
31 same conclusion as we reached in our first encounter with this issue
32 but will discuss our holding in some detail in order to assure

1 complete understanding. We begin by noting that MEPA itself specifies
2 that its policies and goals are supplementary to the existing
3 authorizations of state boards, commissions and agencies. 75-1-105,
4 MCA. Defendants, however, assert Montana case law mandates a
5 contrary conclusion. We feel the major Montana cases on this issue,
6 Montana Wilderness Association v. Board of Health and Environmental
7 Sciences, 171 Mt. 477, 559 P.2d 1157 (1976), and Kadillak v. Anaconda
8 Co., 36 St. Rptr. 1820, 602 P.2d 147 (1979), have been adequately dis-
9 tinguished in our earlier opinion. Those cases were decided on the
10 basis of a direct conflict between the agency's specific regulatory
11 statute and MEPA. Asarco and DSL contend a conflict can be found in
12 this case in that the HRMA specifically enumerates the only basis for
13 which a permit can be denied. 82-4-351, MCA. They say conflict would
14 be created if MEPA were allowed to supplement these bases. A similar
15 argument was made in Environmental Defense Fund, Inc. v. Matthews,
16 410 F. Supp. 336 (D.C.D.C.1976). Federal interpretation of the
17 National Environmental Policy Act (NEPA) is relevant in interpreting
18 MEPA. Kadillak, supra 602 P.2d at 153. The argument that a direct
19 conflict was thus created was soundly rejected in Environmental Defen-
20 Fund, Inc. The following language seems pertinent:

21 The FDCA does not state that the listed
22 considerations are the only ones which the
23 Commissioner may take into account in reaching
24 a decision. Nor does it explicitly require
25 that product applications be granted if the
26 specified grounds are met. It merely lists
27 criteria which the Commissioner must consider
28 in reaching his decision. In the absence of a
29 clear statutory provision excluding consideration
30 of environmental factors, and in light of NEPA's
31 broad mandate that all environmental consider-
32 ations be taken into account, we find that NEPA
provides FDA with supplementary authority to base
its substantive decisions on all environmental
considerations including those not expressly
identified with the FDCA and FDA's other
statutes. Environmental Defense Fund, Inc.,
supra at 338.

31 This line of analysis is buttressed by Zabel v. Tabb, 430 F. 2d 199
32 (5th Cir. 1970), in which NEPA and the Fish and Wildlife Conservation

1 Act were found to provide the Secretary of the Army with authority to
2 refuse projects for ecological reasons despite the fact the project
3 would not interfere with navigation, flood control or the production
4 of power. In Calvert Cliffs' Coordinating Committee, Inc. v. United
5 States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), the
6 court discusses the fact that prior to NEPA the Atomic Energy
7 Commission asserted it was not statutorily authorized to weigh the
8 adverse environmental impacts of its actions. "Now, however, its
9 hands are no longer tied. It is not only permitted, but compelled,
10 to take environmental values into account. Perhaps the greatest
11 importance of NEPA is to require the Atomic Energy Commission and
12 other agencies to consider environmental issues just as they consider
13 other matters within their mandates." Id. at 1112 (emphasis in
14 original).

15 We are aware of other federal cases in which a different conclusion
16 has been reached. In Natural Resource Defense Council v. Berklund,
17 609 F.2d 553 (D.C. Cir. 1979), for example, the court held the
18 Secretary of Interior was without discretion to deny a lease to a
19 qualified applicant. The statutory language, which the court called
20 "unequivocal and clear," id. at 557, was that a permittee, upon establi.
21 ing the presence of 'commercial quantities' of coal, "shall be
22 entitled to a lease under this chapter for all or part of the land in
23 his permit." 30 USC §201(b) (1970) (amended 1976). Similarly, in State
24 of South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980) cert. denied,
25 449 U.S. 822 (1980), the court noted the issuance of a mineral patent
26 has been well established as a ministerial act and the environmental
27 impact statement (EIS) requirement is usually not applied when a
28 ministerial act is involved. In both of those cases the decision turns
29 on the conclusion that the language of the statute removes discretion
30 from the decision maker. In this case, however, a purely
31 ministerial act is clearly not involved. The pertinent statutory
32 language is: "A permit may be denied for any of the following

1 reasons. . . .". As opposed to a declaration that the applicant shall
2 be entitled to a permit upon the establishment of certain
3 conditions, the use of the word "may" in the statute indicates the
4 decision maker does retain discretion. See American Electric Power
5 Service Corporation v. Federal Energy Regulatory Commission, 675 F.2d
6 1226, 1241 (D.C. Cir. 1982). We think the language quoted above from
7 Environmental Defense Fund, Inc., supra, is applicable here and
8 conclude there is no clear statutory language barring consideration of
9 environmental factors. There is, then, no conflict between MEPA and
10 the HRMA and DSL can therefore reject or condition a permit on
11 environmental grounds additional to those listed in Section
12 82-4-351, MCA.

13 Further support for this conclusion can be found in discussions of
14 the purpose of an EIS. Asarco and DSL assert that their inter-
15 pretation of MEPA as not supplementing DSL's decision making authority
16 would not render an EIS meaningless as the EIS would still perform its
17 function as a disclosure law. We conclude MEPA was intended to affect
18 decision making as well as to disclose environmental consequences, and
19 again refer to analysis of NEPA to support this statement. As
20 recognized by the Council on Environmental Quality, "[t]he primary
21 purpose of an environmental impact statement is to serve as an action-
22 forcing device to insure that the policies and goals defined in the
23 Act are infused into the ongoing programs and action of the Federal
24 Government. . . . An environmental impact statement is more than a
25 disclosure statement. It shall be used by Federal officials in
26 conjunction with other relevant material to plan actions and make
27 decisions." 40 CFR §1502.1 (1981). In Weinberger v. Catholic Action
28 of Hawaii, ___ U.S. ___, 102 S.Ct. 197 (December 1, 1981), the
29 United States Supreme Court noted that the aims of NEPA's EIS re-
30 quirement are "to inject environmental considerations into the federal
31 agency's decisionmaking process. . . . and to inform the public that
32 agency has considered environmental concerns in its decisionmaking

1 process." Id. at 201. Environmental Defense Fund, Inc. v. Corps of
2 Engineers, U.S. Army, 470 F.2d 289 (8th Cir. 1972), makes it clear
3 NEPA "is more than an environmental full-disclosure law. NEPA was
4 intended to effect substantive changes in decisionmaking." Id. at 297.
5 See also Environmental Defense Fund v. Tennessee Valley Authority,
6 468 F.2d 1164, 1174-1175 (6th Cir. 1972) and Trout Unlimited v. Morton
7 509 F.2d 1276, 1282 (9th Cir. 1974). As summarized in Monroe County
8 Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2nd Cir. 1972)
9 "... the primary purpose of the impact statement is to compel
10 federal agencies to give serious weight to environmental factors in
11 making discretionary choices. . . ." The cases quoted above indicate
12 serious weight involves more than merely disclosing environmental
13 consequences. Those consequences must be considered in the agency's
14 decisionmaking process, just as the agency considers other matters
15 within its mandate. In this case, then, DSL must consider other
16 environmental factors in making its decision to grant, condition or
17 deny a permit just as it considers air and water quality and re-
18 clamation. It is not sufficient for the agency to note the presence
19 of adverse environmental factors while denying authority to do any-
20 thing about them. Nor can an agency "escape the requirements of NEPA
21 [MEPA] by excessively constricting its statutory interpretation in
22 order to erect a conflict with NEPA [MEPA] policies." Natural
23 Resource Defense Council v. Berklund, supra at 558. We note the fact
24 that other states have reached similar conclusions as to the impact
25 of their state environmental policy acts. See Department of Natural
26 Resources v. Lake Lawrence Public Lands, 92 Wash.2d 656, 601 P.2d 494
27 cert. denied, 449 U.S. 830 (1980); City of Roswell v. New Mexico Water
28 Quality Control Commission, 84 N.M. 561, 505 P.2d 1237 (1972), cert
29 denied, 84 N.M. 560, 505 P.2d 1236 (1973); Town of Henrietta v.
30 Department of Environmental Conservation of the State of New York, 43
31 N.Y.S. 2d 440 (1980).

32 We find additional authority for our conclusion in the following

1 sections of the 1972 Montana Constitution:

2 Inalienable rights. All persons are born
3 free and have certain inalienable rights. They
4 include the right to a clean and healthful envi-
5 ronment and the rights of pursuing life's basic
6 necessities, enjoying and defending their lives
7 and liberties, acquiring, possessing and protecting
8 property, and seeking their safety, health and
9 happiness in all lawful ways. In enjoying these
10 rights, all persons recognize corresponding
11 responsibilities. Art. II, §3 (emphasis added.)

12 Protection and improvement. (1) The state and
13 each person shall maintain and improve a clean and
14 healthful environment in Montana for present and
15 future generations.

16 (2) The legislature shall provide for the
17 administration and enforcement of this duty.

18 (3) The legislature shall provide adequate
19 remedies for the protection of the environmental
20 life support system from degradation and provide
21 adequate remedies to prevent unreasonable
22 depletion and degradation of natural resources.
23 Art. IX, §1.

24 The fact that Montana has given constitutional status to
25 maintenance of a clean and healthful environment demonstrates the
26 heightened importance which must be placed on actions which affect the
27 environment of this state. There is no comparable constitutional
28 protection afforded federal actions. The conclusion we reached above
29 as to the impact of MEPA was based largely on federal interpretation
30 of NEPA. The presence of these additional constitutional
31 provisions provides authority for even stronger environmental protect-
32 ion in this state. See Tobias and McLean, Of Crabbed Interpretations
and Frustrated Mandates, 41 Mt. L. Rev. 177 (1980). In the event we
could not find support for our conclusion in NEPA interpretation, the
combination of MEPA and the above constitutional sections would
provide the necessary authority.

In the interest of thoroughness we respond to two additional
arguments made by Asarco and DSL. The first is that the legislative
background of MEPA and the HRMA provides support for their
interpretation of MEPA's impact, or rather the absence thereof. The
argument is since both acts were passed the same day, the

1 legislative intent could not have been to allow MEPA to supplement
2 DSL's permitting authority. There would be no reason to
3 specifically enumerate the bases for denial if these bases were al-
4 ready provided for and in fact enlarged by MEPA. We hesitate to
5 attempt to conclusively ascertain the legislative intent on this
6 issue from the fact of the simultaneous passage. We would point out,
7 however, that in some instances, such as when no major state action is
8 involved, portions of MEPA would not apply to DSL's actions. The
9 provisions of Section 32-4-351, MCA, would operate in the absence of
10 certain supplementary MEPA provisions in such a situation.

11 Secondly, defendants repeatedly refer to a statement in Montana
12 Wilderness Association, supra 559 P.2d at 1161, which purportedly
13 supports defendant's interpretation of MEPA. The statement is that
14 MEPA does not contain any regulatory language. [We repeat our
15 observation that that case was decided on the basis of conflict between
16 MEPA and the Subdivision and Platting Act, a factor which is not
17 present here.] We would also point out that MEPA is patterned after,
18 and almost identical to, NEPA. A great deal of our authority for
19 reaching our conclusion comes from federal case law interpreting NEPA.
20 The federal courts have based their decision on statutory language
21 almost identical to ours, and we therefore cannot agree that the
22 statement from Montana Wilderness requires a change of decision.

23 For the reasons stated above, Asarco's and DSL's motions for
24 summary judgment as to Count I are denied. In light of this decision
25 it is not necessary to discuss Count II except to note material issues
26 of fact still remain as to that count. We therefore also deny the
27 motions for summary judgment as to Count II.

28 Dated this 29th day of September, 1982.

29
30 John V. [Signature]
District Judge

31
32 cc: Counsel of record